UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW PEAKE

Plaintiff,

v.

CHEVRON SHIPPING CO., INC., CHEVRON TRANSPORTATION CORPORATION, LTD.,

Defendants.
_____/

No. C 00-4228 MHP

MEMORANDUM AND ORDER
Post-Trial Motions

On November 14, 2000, plaintiff Matthew Peake filed an action in this court against Chevron U.S.A., Inc., Chevron Shipping Co., Inc., and Chevron Transportation Corp., Ltd. (collectively "defendants"). In pertinent part, plaintiff's complaint alleged that defendants—individually and collectively—had violated California contract law, the Jones Act, and general maritime law. See, e.g., 46 U.S.C. § 688. Over the next four years, plaintiff restructured his complaint, focusing certain causes of action on particular defendants (e.g., plaintiff's Jones Act claim directed solely against Chevron U.S.A.) while eliminating some causes of action altogether. After a number of pretrial motions and status conferences, the parties tried the case before a jury in spring of 2004. On May 25, 2004, the jury delivered a verdict for plaintiff, finding that plaintiff was entitled to recover over $3,000,000 for his breach of contract, negligence, unseaworthiness, and maintenance and cure claims. Now before the court are the parties' many post-trial motions—though not those relating to defendants' motion(s) for a new trial, as the court decided those motions during a June 7, 2004, post-trial conference. The court has considered the parties' arguments fully, and for the reasons set forth below, the court rules as follows.

BACKGROUND[1]

Beginning in 1989, plaintiff worked for Chevron U.S.A. as an able-bodied seaman. Over time, plaintiff was promoted through the Chevron U.S.A. system, ultimately rising, in 1999, to the position of mooring master / environmental cargo officer. During that same year, plaintiff began to experience lower back pain, the symptoms of which he described as severe and worsening. This back injury was only aggravated, plaintiff asserts, when he was injured moving through a water-tight door on a Chevron Transport vessel on January 17, 2000. Shortly after this injury—and, as defendants note, after another back-related event—plaintiff was found "not fit for duty." He retained this classification until March 21, 2000.

In late March 2000, plaintiff returned to work, apparently functioning without problem until May 2000. At that time, plaintiff took a voluntary leave from Chevron—ostensibly in response to claims of plaintiff's drug and alcohol abuse, all of which plaintiff denied. In July 2000, plaintiff again returned to work for Chevron, remaining on duty for approximately one month. On August 4, 2000, plaintiff voluntarily entered defendants' Employee Assistance Program. As a part of this program, plaintiff completed two weeks of inpatient drug and alcohol rehabilitation treatment and two weeks of intensive outpatient therapy; when he entered the program, plaintiff signed a Return to Work Agreement, which plaintiff claimed—and the jury found—Chevron U.S.A. later breached.

Throughout this period, plaintiff's back pain persisted. Defendants provided "maintenance and cure" payments for the period between March 12, 2002, and December 31, 2002,[2] see Pl.'s Post-Trial Mot., at pp. 5–6, but Chevron did not offer "maintenance and cure" for the entire period in which plaintiff was unfit for duty. Following trial, the jury found that defendants' failure to provide "maintenance and cure" was willful and arbitrary. The jury also found in plaintiff's favor on all of his other claims, awarding plaintiff over $3,000,000 in damages; over a third of this total was awarded as lost income and lost benefit damages for plaintiff's tort-based (personal injury) claims.

After the jury delivered its verdict, the court conducted a post-trial status conference. At this meeting, the court denied defendants' multifarious motion for a new trial, expressly preserving

defendants' right to appeal. Also at this meeting, the court directed the parties to submit post-trial motions on three issues that were not—or could not have been—resolved by the jury: First, whether the jury's award contract damages was excessive, duplicative, or otherwise unreasonable; second, what the appropriate rate of maintenance and cure is in this instance; and, third, what measure of attorneys' fees is due to plaintiff's counsel vis-a-vis his litigation of maintenance and cure issues. All three issues are now before the court.

DISCUSSION

I. Contract Damages

Of the three questions before the court, the issue of plaintiff's contract damages can be resolved most quickly. Before this action was submitted to the jury, the court determined that plaintiff's contract damages should be substantially limited—specifically, to the wages and benefits that might have accrued in the ninety (90) days following October 30, 2004. Despite this express limitation on the contract damages available to plaintiff, the jury awarded $780,000 in breach of contract damages—$640,000 for lost wages and $140,000 for lost benefits. See, e.g., Def.s' Mot., at p. 2. Given the facts of the case and the damage limits set by the court, both sums are undeniably excessive: None of the evidence adduced at trial justifies such profligate damage totals, and plaintiff never even suggested—let alone established—that he earned over $200,000 per month. See, e.g., Pl.'s Opp., at p. 2 (conceding that the lost wage figure should be reduced to $25,000 if the 90-day limit is reaffirmed).

In comparable contexts, courts have opted to remit (i.e., to reduce) jury awards, recalculating damage amounts based on the scope of the plaintiff's claims and the evidence adduced at trial. See, e.g., Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 905 (9th Cir. 2000) ("Where there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict.") (citing Seymour v. Summa Vista Cinema, Inc., 809 F.2d 1385, 1387 (9th Cir. 1987)). Such recalculations are rarely easy; they often

involve consideration of imprecise numbers and unknown jury considerations, and they invariably require the court to address arbitrarily-selected damage values. Cf. Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1042 (9th Cir. 2003) ("[A]ppellants argue that the $2,600,000 award here was excessive and should be reduced to some unspecified amount.") (citations omitted); Webb v. Ada County, 285 F.3d 829, 839 (9th Cir. 2002). But the court need not rely on such difficult and vague computations here. All of the contract damages awarded to plaintiff were duplicative of other damages awarded by the jury—namely those awarded for plaintiff's tort-based personal injury claim. As a result, the full sum of plaintiff's contract damages (that is, *all* $780,000 of the award) is prohibited by California law. See, e.g., Abdala v. Aziz, 3 Cal. App. 4th 369, 376–77 (Cal. App. 1992).

For years, California's courts have reiterated the "undeniable proposition" that a plaintiff is "not entitled to a double recovery." Waffer Int'l Corp. v. Khorsandi, 69 Cal. App. 4th 1261, 1280–81 (Cal. App. 1999); see also Abdala, 3 Cal. App. 4th at 376–77 ("Duplicate recovery of damages is barred, and neither double recovery of the same item of loss nor double liability for the same item of injury is permitted.") (citations omitted). Where a plaintiff asserts both a contract claim *and* a tort claim arising from the same factual setting, that plaintiff *cannot recover damages* under both theories. See, e.g., DuBarry Int'l., Inc. v. Southwest Forest Indus., Inc., 231 Cal. App. 3d 552, 564 (1991) ("If a given state of facts entitles one to recover damages upon [a] theory of tort, and the same set of facts entitles him to recover upon [a] theory of contract, it would be seem plain that recovery could not be twice had because the facts would support recovery upon either theory."); Pugh v. See's Candies, Inc., 203 Cal. App. 3d 743, 761 & n.13 (1988). Yet this kind of prohibited "duplicate recovery" is precisely what occurred here.[3] Finding in plaintiff's favor on all claims, the jury awarded plaintiff substantial lost income and lost benefit damages for his tort-based personal injury cause of action. Plaintiff's contract damages merely duplicate these tort-based sums, improperly granting plaintiff a double measure of lost income and lost benefit damages based on claims arising from the same

factual setting. Such double recovery is precluded by law, and the court vacates the full breach of contract damage total accordingly. See id.[4]

II. Rate of Maintenance and Cure

As a part of general maritime law, ship-owners have a legal duty to pay "maintenance and cure" to injured or ill seamen. See Williamson v. Western Pac. Dredging Co., 441 F.2d 65, 66 (9th Cir. 1971) (noting that the injury or illness need not "occur aboard ship" so long as the "disability resulted from the seam[a]n's activities while on duty"). This duty has deep historical roots, and many courts have explored its origins (and evolutions) at great length. See, e.g., Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 945–46 (9th Cir. 1986) (discussing the "Middle Age" provenance of "maintenance and cure"); Ammar v. United States, 342 F.3d 133, 142 (2d Cir. 2003) (repeating Justice Story's oft-cited discussion of "poor, friendless and improvident" seamen who must be shielded from the "hazards of illness and abandonment while ill in foreign ports") (citations omitted). For the purposes of this order, the court need not reexamine all of the duty's historical terms. Instead, the court need only answer two questions: First, whether plaintiff's "maintenance and cure" sum should be apportioned to reflect the amount of time per month he actually spent on one of defendants' vessels; and, second, what the appropriate daily rate of "maintenance and cure" is in this instance.[5]

The question of apportionment of "maintenance and cure" is a somewhat simpler issue.[6] The Ninth Circuit has held that "the obligation of maintenance [is to be] enforced *even where maritime compensation did not include board and lodging*—[that is,] *where the seaman was expected to pay for his meals out of his wages*." See Crooks v. United States, 459 F.2d 631, 633 (9th Cir. 1972) (emphasis added). This approach to "maintenance and cure," the Ninth Circuit has acknowledged, is not without problem; for example, an overarching right to a full measure of "maintenance and cure"—regardless of proportional ship-based time—raises a substantial risk of double recovery, especially where, as here, a seaman appends negligence and unseaworthiness causes of action to his "maintenance and cure" claim. See id. at 634–35 ("Our case illustrates the problem of double

recovery involved in the award of 'maintenance' (on a maritime contract theory) *and* 'lost wages' (on a negligence and unseaworthiness theory) during convalescence, *where the lost wages are attributable to shore-side labor as well as ship-side labor.*") (emphasis in original). But the general prohibition against double recovery is "not without exception," and the Ninth Circuit has determined that the "better rule . . . is that the maintenance obligation is independent of that to compensate for lost wages and exists *without regard* to the fact that lost wages may be computed on the basis of employment ashore." Id. (emphasis added). No *pro rata* determination of the seaman's expenses need—or should—be performed. Id. Rather, "during the period of his disability," a seaman is "entitled to be provided with maintenance as well as cure . . . *[n]o matter what the terms of his maritime employment were.*" Id. (emphasis added); cf. Kopcyzinski v. The Jacqueline, 742 F.2d 555, 559–60 (9th Cir. 1984) (discussing whether attorneys' fees are warranted in a particular action); Williamson, 441 F.2d at 66 (discussing whether "maintenance and cure" is justified *ex ante*).

Even as a land-based mooring master, then, plaintiff is "entitled" to a full measure of "maintenance and cure." That he was "expected to pay" for his meals and lodging "out of his wages" is immaterial; that he spent only a few days per month aboard one of defendants' vessels is inapposite as well. Id.; see also Barnes, 900 F.2d at 641–43 (agreeing with Crooks' outcome); Hudspeth v. Atlantic & Gulf Stevedores, Inc., 266 F. Supp. 937, 943 (E.D. La. 1967) (cataloging cases reaching the same conclusion; advocating a "simple," non-apportioned approach).[7] So long as plaintiff is entitled *ex ante* to payment of "maintenance and cure"—which he was here—he is entitled to receive payment for the entire "maintenance and cure" period. *No* deduction or apportionment for days he would have spent ashore applies. Id. The court thus finds that plaintiff is entitled to recover "maintenance and cure" for the full duration of his period of maintenance, minus those periods already paid by defendants.

What daily rate of "maintenance and cure" plaintiff is due, however, is a significantly more difficult question—largely because of the inattention and sloppiness of plaintiff's attorney. For many seamen, the appropriate "maintenance and cure" rate is established by a collective bargaining

agreement: Some such agreements set a $15 per day rate; most still reflect a long-set $8 per day sum. See, e.g., Gardiner, 986 F.3d at 949–50 (holding that a rate set by a collective bargaining agreement must be enforced even if it is grossly inadequate). Yet plaintiff's employment with defendants as a mooring master was not governed by a collective bargaining agreement, so the court itself must assign an appropriate and reasonable "maintenance and cure" rate.[8] See Hall, 242 F.3d at 585–89. As a rule, a "seaman is entitled to a reasonable cost of food and lodging"—a figure determined by calculating actual and reasonable expenses, comparing the two, and deciding whether actual expenses were inadequate. See id. at 588–89. As an obvious corollary to this rule, a "plaintiff must present evidence to the court that is sufficient to provide an evidentiary basis for the court to estimate his actual costs." Id. at 590. Without such evidence, a court cannot assess what a seaman's expenditures were, nor can it perform the necessary comparative analysis between "actual expenses [and] reasonable expenses." Id. (positing this comparison as the second of three "maintenance and cure"considerations). Where a plaintiff fails to do so—that is, where the plaintiff "presents no evidence of actual expenses"—many courts have held that "the plaintiff *may not recover maintenance*." Id. (emphasis added); see also Barnes, 900 F.2d at 641 ("[I]t is established that the seaman is entitled only to expenses actually incurred.") (citations omitted).[9]

Plaintiff produced *no evidence of actual expenses at trial*; indeed, he readily admits as much. See Pl.'s Mot., at p. 3 ("Plaintiff . . . did not present evidence at trial of his actual living expenses."). Plaintiff also neglected to append any such evidence to his post-trial filings. Instead, at trial, plaintiff attempted to establish a "benchmark" (of an indeterminate sort) regarding the cost of "basic" food and lodging in San Diego and the putative cost of such benefits on board one of defendants' ships. See id. at pp. 2–3. To do so, plaintiff offered two types of evidence: one, photographs of accommodations aboard defendants' ships (or ships like them); and, two, testimony regarding the value of ship accommodations and the cost of living in San Diego. Id. (recounting the testimony of Joyce Pickersgill (regarding San Diego expenses) and of plaintiff (regarding his "own investigation" of the cost of commensurate food and lodging—*not* his actual expenses)). In some ways, this evidence is

helpful in establishing what *reasonable* expenses may be. But none of this evidence is more than orthogonally related to the predicate, *actual* expenses inquiry, and none of it qualifies as evidence of plaintiff's actual expenses.[10] Cf. Hall, 242 F.3d at 588 ("At trial, Stuart and Hall presented itemized lists of their expenses, which included housing and food, telephone, satellite TV, automobile, and other expenses. They also presented an expert witness who described their expenses and provided national and regional estimates of the cost of food and lodging."). Since plaintiff has largely—and admittedly—neglected this primary evidentiary prerequisite, the court is left to find evidence of actual expenses in other portions of the record; the court is also left to assign a rate of "maintenance and cure" in spite of the lack of same from plaintiff's counsel. Cf. Hall, 242 F.3d at 591 ("Stuart and Hall *had to provide evidence of their actual expenses* on food and lodging sufficient to constitute an evidentiary basis for the court's awards of maintenance.") (emphasis added).[11]

There is some evidence of plaintiff's actual expenses in the record. A defense witness testified at trial that, for a limited period, defendants paid $33 per day in "maintenance and cure"; this figure, the witness explained, reflected the $1,000 per month plaintiff paid a girlfriend for room and board during the relevant time period. See, e.g., Pl.'s Mot., at p. 2. Still, plaintiff has asked the court to double (if not more) this $33 measure—the only figure with any link to plaintiff's actual expenses—because the "quality of room and board" offered at sea entitles him to a "maintenance and cure" rate somewhere "between $67 and $120 per day." See Pl.'s Mot., at p. 3.

Without question, plaintiff's $67 to $120 scale far exceeds any established collective bargaining agreement benchmark. See, e.g., Ammar, 342 F.3d at 143 ("From at least 1957 until the late 1980s, collective bargaining agreements between vessel owners and seamen's unions uniformly set the maintenance rate at $8 per day. Thereafter, some [agreements] set different amounts[,] such as $10 per day, or $15 per day, or $30 per day.") (citations omitted). In fact, plaintiff's range exceeds nearly every "maintenance and cure" rate assigned to date—either in the collective bargaining context or outside of it. See, e.g., Hall, 242 F.3d at 591 ("The total of Stuart's maintenance expenses–mortgage, escrow, real estate insurance, utilities, and food–that Stuart claimed and

supported by evidence is $29.14 per day. The total maintenance expenses claimed and supported by Hall is $37.07 per day."); Lodrigue v. Delta Towing, L.L.C., 2003 WL 22999425, *14 (E.D. La. 2003) (setting a maintenance rate of $31.00 per day); cf. Bachir v. Transoceanic Cable Ship Co., 2002 WL 1870068, *2 (S.D.N.Y. 2002) (rejecting an $80 per day figure; finding that a $68.95 per diem was appropriate only *after* plaintiff adduced sufficient evidence of his *actual* expenditure of that amount). The court is mindful, of course, that a maintenance figure rate should "reflect the costs of food and lodging in a particular area." Hall, 242 F.3d at 588 (citation and internal quotation marks omitted). But the court is likewise mindful that a "seaman is entitled [only] to a *reasonable* cost of food and lodging." Id. at 588–89 (emphasis added). In this case, considering the scant proffered evidence of actual expenses and plaintiff's impressionistic evidence of "basic" costs, the court finds that an appropriate and "reasonable" figure is substantially lower than plaintiff's $120 per day request. An appropriate maintenance rate is, rather, $33 per day. And though substantially lower than plaintiff's $120 request, this $33 figure is far more than plaintiff might otherwise have recovered. Compare Hall, 242 F.3d at 590 ("If plaintiff presents no evidence of actual expenses, the plaintiff may not recover maintenance."), and id. at 588 ("[T]he shipowner is obligated to pay the seaman no more than the seaman actually spends to obtain reasonable food and lodging."), with Pl.'s Mot., at p. 3 (admitting that he presented no actual expense evidence at all); see also Barnes, 900 F.2d at 641.

Factored into this $33 per day figure are the costs and demands of plaintiff's locale, his proportional share of includable living expenses, the *per diem* necessary to "afford [plaintiff] reasonable sustenance and shelter," and the portions of "maintenance and cure" already remitted. Id.; see also id. at 585 ("[M]aintenance does not provide for expenses such as telephone or automobile bills or the costs of supporting children."). Since plaintiff has already received payment for all days *excluding* November 1, 2000, through September 30, 2001, he is entitled to 334 days of maintenance. Defendants are thus directed to pay $11,022 (334 days *x* $33 / day) minus Social Security disability payments already paid to plaintiff—which the parties agreed would be deducted from the maintenance

sum, though neither has quantified this sum in any submission to the court. Defendants are to pay for plaintiff's remaining "cure" sums as well—to the extent they have not done so already.

III. Attorneys' Fees

Where a "shipowner ha[s] been 'willful and persistent' in its failure to investigate . . . or to pay maintenance," a plaintiff may seek those attorneys' fees related to the prosecution of the "maintenance and cure" claim. Glynn v. Roy Al Mgmt. Corp., 57 F.3d 1495, 1501 (9th Cir. 1995) (citing Vaughan, 369 U.S. at 531–33). The jury found defendants to have been "willful and persistent" in their failure to pay plaintiff's maintenance sums, and the veracity of that finding is not at issue here. Cf. id. What is at issue is the measure of attorneys' fees that plaintiff's counsel warrants. Plaintiff has requested $338,927.50[12] in fees and $114,496.53 in costs.

When determining a reasonable attorneys' fees figure, courts (in this circuit, at least) must first calculate a "lodestar." Jordan v. Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). A "lodestar" is found "by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986); accord Keith v. Volpe, 833 F.2d 850, 859 (9th Cir. 1987); see also Jordan, 815 F.2d at 1262 (noting that there is a strong presumption that the lodestar figure represents a reasonable fee). In general, an attorney seeking a fee award must support her / his claim of hours worked by submitting detailed time records. Id.; see also Hensley v. Eckerhart, 461 U.S. 424, 434 & 437 n.12 (1983) (requiring a modicum of invoice specificity and assuring that attorneys cannot recover fees for sums that would not have been billed to the client). If the documentation provided is inadequate, the court may adjust the number of hours figure downward; the same is true where any of the hours claimed are duplicative, excessive, or unnecessary. Id. By slight contrast, when assigning a reasonable hourly rate, the court must consider several additional factors, namely the so-called Kerr factors. See Jordan, 815 F.2d at 1262 (discussing the "critical" inquiry of locating a reasonable hourly rate) (citation omitted); Chalmers, 796 F.2d at 1210; see also Kerr v. Screen Actors Guild, Inc., 526 F.2d 67, 70 (9th Cir.) (instructing courts deciding upon reasonable attorney's fees to examine "(1) the time and labor

required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirabililty' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases."), cert. denied, 425 U.S. 951 (1976). When assigning a reasonable hourly rate, the court must consider the prevailing rate that is charged in the same legal community for similar work performed by attorneys of comparable skill, experience, and reputation; the court may not refer to the rates actually charged to the prevailing party. Id. at 1210-11; Jordan, 815 F.2d at 1263 (noting that it is the applicant's burden to produce evidence, other than the declarations of interested counsel, that "the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation"). The court must always pay particular attention to "the degree of success obtained," Hensley, 461 U.S. at 436, comparing "the amount of damages awarded . . . to the amount sought." Farrar v. Hobby, 506 U.S. 103, 114 (1992) (citing Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell, J. concurring)) (internal quotation marks omitted); see also McGinnis v. Kentucky Fried Chicken of California, 51 F.3d 805, 810 (9th Cir. 1995) ("Where the relief sought and obtained is limited to money, the terms 'extent of success' and 'level of success' are euphemistic ways of referring to money.").[13]

In general, the same rules and factors apply when awarding "maintenance and cure"-based attorneys' fees. See, e.g., Glynn, 57 F.3d at 1501. When assessing a request for "maintenance and cure"-based attorneys' fees, however, a pair of additional issues arise: first, what amount of the total time litigating a particular action did the applicant spend exclusively on "maintenance and cure" issues; and, second, how much of the attorney's time spent pursuing other issues (at least in part) is inextricably intertwined with "maintenance and cure" concerns as well. See, e.g., Deisler v. McCormack Aggregates, Co., 54 F.3d 1074, 1080 (3d Cir. 1995) (discussing the difficulty in making

such allocations and finding no error in a 90%-10% split). Neither of these questions are particularly difficult in this instance. Plaintiff's attorney claims that 80% of his total time is directly attributable to—or inextricably intertwined with—the "maintenance and cure" issues that "dominated" this litigation; only 20% of the attorney's time, he claims, is exclusively attributable to other matters. The court sees no reason to modify or revise this ratio. It is true, of course, that plaintiff's "maintenance and cure" recovery totals only a small portion of his overall recovery; it is likewise true that plaintiff overstates the preeminence of the "maintenance and cure" issues in his request for fees. But these "maintenance and cure" issues did overlap (significantly) with nearly all of the other liability issues in this action, and the 80% figure proposed by plaintiff is appropriate here. Cf. Williams v. Kingston Shipping, Inc., 925 F.2d 721, 726 (4th Cir. 1990).

With regard to plaintiff's counsel's requests for $338,927.50 in fees and $114,496.53 in costs, however, the court finds ample reason to reduce plaintiff's desired totals. See, e.g., Pl.'s Mot., at pp. 2–3.[14] Plaintiff's attorney has requested that fees be paid at four separate rates: $300 for himself and one of his partners, $250 for another partner, $200 for yet another partner, and $75 for a paralegal. See Decl. of E. Bull, Exh. A. With two exceptions, the court finds that these fees are sufficiently commensurate with other attorneys (or paralegals) in the field of comparable skill. See, e.g., Decl. of E. Bull, at pp. 3–4; Decl. of J. Schratz, at p. 3. Only the $250 and $300 per hour figures are excessively high, albeit slightly so. See Morris Decl., at p. 11.[15] Similarly experienced and skillful attorneys—with comparable maritime specialties—bill approximately $225 per hour, not the $250 or $300 figures requested here. See id. The court thus reduces the $300 hourly figure for Mr. Bull and Mr. Micklow by $75 per hour and the $250 figure for Mr. Lopez by $25 per hour, setting the relevant rate at $225 per hour—an hourly charge quite close to what Mr. Bull attests to using in many comparable instances. See Decl. of E. Bull, at p. 3 (noting that he often charges $250 per hour for clients, like plaintiff, "paying on an hourly basis"). For the purposes of calculating a lodestar total, then, the reasonable hours billed by E. Bull, K. Micklow, and J. Lopez will be set at a $225 hourly

rate; those billed by A. Bull will be set at $200 per hour; and those billed by E. Culver will remain at $75 per hour.[16]

Many of plaintiff's requested hours are likewise unproblematic—i.e., "reasonable." See Chalmers, 796 F.2d at 1210. Plaintiff has requested payment (at varying hourly rates) for 1182.4 hours of work: 1,085.5 for attorneys billing now all billing at $225 per hour; 49.6 for those billing at $200; and 47.3 for the paralegal billing at $75. A good portion of the 1,085.5 total is, in fact, "reasonable." Id. For those hours billed at $200 per hour or less, the hours requested are "reasonable." But a sizable segment of the 1,085.5 figure is not so reasonable. It reflects, rather, inadequately documented time and duplicative, excessive, or unnecessary effort—i.e., precisely the kind of time attorneys are *not* permitted to recover. See, e.g. id. Defendants have challenged approximately 400 hours of plaintiff's counsel's time—about 23 hours as entirely duplicative or unnecessary and about 380 hours as inadequately described or excessive. See, e.g., Morris Decl., at pp. 3–11. Most of defendants' questions are meritorious; a close review of the invoice submitted by plaintiff's counsel reveals that much of counsel's effort was duplicative, redundant, and inefficient. See Decl. of E. Bull, Exh. A. Plaintiff's counsel did twice bill particular deposition (3 hours) and pretrial time (4 hours), and he did allot excessive time to jury and witness issues never seriously pursued (4 hours). Plaintiff counsel also included close to 300 hours without providing sufficient work-related detail, and he did bill far more time (50 hours) for his attorneys' fee petition than was reasonable. In addition, counsel's billing total for preparation of jury instructions is substantially overstated—as plaintiff's counsel prepared largely identical jury instructions in preparation for two separate trial dates. See Decl. of E. Bull, Exh. A at pp. 39–43, 61–62. A "reasonable" hourly figure should not (and does not) include such repeated and extraneous effort.[17] For this type of vacuous or inadequately-described attorney time—and for time not billed to the client—the court subtracts 180 hours from the 1,085.5 total; for time twice-billed, the court will strike another eleven hours. Cf. Hensley, 461 U.S. at 434. In total, then, the 1,085.5 hourly figure must be reduced by 191 hours—setting the final, *reasonable* hourly sum at 894.5 hours. The resulting preliminary "lodestar"

is $214,730—$201,262.5 for 894.5 hours of attorneys billing at $225 per hour; $9,920 for those billing at $200; and $3,547.50 for the paralegal billing at $75.

For similar reasons, plaintiff's Kerr multiplier must be adjusted downward, reducing plaintiff's lodestar total. See Kerr, 526 F.2d at 70. To be sure, a single (if critical) Kerr factor militates in favor of a multiplier of one here. See Hensley, 461 U.S. at 436 (explaining that the court must always pay particular attention to "the degree of success obtained"). Plaintiff's "degree of success" in this action has been significant; the jury awarded over $3,000,000 in total damages—before reductions for duplicative totals—and even the "maintenance and cure" figure alone is substantial. Id.; see also Kerr, 526 F.2d at 70 (numbering as factor 8 the amount sought / amount recovered consideration). Another five Kerr factors prove either irrelevant or unimportant here: There is no claim that counsel was precluded from other employment because of the acceptance of plaintiff's case; the existence of a contingent fee agreement—to the extent that plaintiff's counsel has even attested that one exists—does not warrant an increase in the fee award; no time limitations were imposed by the client or the relevant circumstances; the nature and length of the professional relationship between attorney and client was not in any way peculiar, as current counsel did not even help plaintiff commence this action; and the case was not "undesirable" for an attorney. See Kerr, 526 F.2d at 70 (listing these considerations as factors 4, 6, 7, 10, and 11, respectively)

But three remaining Kerr factors—all of which are particularly important here—each militate in favor of a *reduced* multiplier. Id. To begin, the "time and labor" factor supports a substantial reduction of the relevant multiplier. Id. This long-running action required, to be sure, a good deal of attorney time and attention, whether in securing witnesses or preparing for depositions. But the action did not require the quantum of time or labor supposedly invested by plaintiff's counsel. Most of plaintiff's filings were overly verbose and digressive;[18] much of counsel's in-court time was spent obfuscating simple issues and belaboring unimportant points;[19] and many of plaintiff's arguments were inexpertly defined and unnecessarily overwrought.[20] Under Kerr's "time and labor" factor, then, the multiplier must be reduced downward. Likewise, Kerr's "novelty and difficulty" and "requisite

skill" factors favor a reduction in the relevant multiplier. Nothing in this suit required "'cutting edge' evaluations of legal rules," and nothing in plaintiff's submissions illustrated particular attention to "the more subtle nuances" of the relevant law. See Pl.'s Mot., at p. 24. Instead, this case was quite like a typical maritime dispute between a seaman and his employer—albeit a long and often over-litigated one. That plaintiff's counsel attempted to make it more novel and unnecessarily difficult does not make his handling of the matter any more skillful. See Kerr, 526 F.2d at 70.[21] It does, however, demand that the Kerr multiplier be substantially lower than one. The court thus finds that a multiplier of .70 is appropriate. The final attorneys' fees total is set at $150,311 accordingly. Requested costs (of $114,496.53) are reduced by $31,772—$15,000 for excessive expert witness fees and $16,772 for costs not recoverable (e.g., computerized legal research); the cost total is thus $82,724.53. See id.

CONCLUSION

For the foregoing reasons, defendants' motion for a new trial is DENIED. The full measure of plaintiff's contract-damage recovery is VACATED as duplicative. A "maintenance" rate is SET at $33 per day, and defendants are ORDERED to pay for the 334 days between November 1, 2000, and September 30, 2001. Plaintiff's counsel is AWARDED $150,311 in fees and $82,724.53 in costs.

IT IS SO ORDERED.

Dated: August 9, 2004

MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. Unless otherwise noted, these background facts are culled from the trial record and from the jury's many conclusions.

2. Not until the end of 2002, when plaintiff had surgery on this back, did plaintiff's condition improve (i.e., did plaintiff reach maximum medical cure).

3. Plaintiff does not actually challenge this conclusion. Instead, plaintiff makes two claims: First, he argues that the $640,000 figure is justifiable because the jury found that Mr. Peake would have worked for Chevron for years if not for Chevron's breach of contract; second, he claims that the contract-damage sum is not duplicative of the tort-damage total because it included "offset" awards somehow not a part of the tort figure. See Pl.'s Opp., at pp. 2–3, 10. Neither of these claims is tenable, let alone persuasive. On the first, plaintiff elides entirely the core point. The court expressly limited the relevant damage window to *90 days*, not to some indefinite future date of voluntary resignation. There is no reason to revisit that decision here; there was no reason for the jury to disregard that limitation before; and there is no way that the jury's prediction can substitute for the court's explicit limitation. On the second, plaintiff states no legitimate reason that the contract sums are not redundant. His one-page analysis of the duplicative-recovery question is bereft of legal (and logical) support; he posits no real theory of non-duplication; and he confuses the meaning of "offset," "future lost income," and the like. Id. What the jury awarded was entirely and undeniably "duplicate recovery." Even if the jury wanted to use contract damages as a surrogate for tort-based remuneration, it could not –and should not –have done so, as the award derogates the court's 90-day limit.

4. It is important to note that this aspect of the court's decision depends *entirely* on the duplicate nature of plaintiff's tort and contract damages. The court does *not* find in defendants' favor on any of the many evidentiary arguments raised (if not explored) in defendants' post-trial motion, nor does the court revisit any of defendants' related motions for a new trial under Federal Rule of Civil Procedure 59. Plaintiff's contract damages are impermissible because they duplicate damages awarded in tort based on the same set of facts; the court decides nothing more.

5. The parties agree—as they must—that "maintenance" refers to "the living allowance for a seaman while he is ashore recovering from injury or illness"; "cure," in turn, denotes the "payment of medical expenses incurred in treating the seaman's injury or illness." Barnes v. Andover Co., 900 F.2d 630, 633 (3d Cir. 1990) (citing Vaughan v. Atkinson, 369 U.S. 527, 531 (1962), and Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938)); see also Hall v. Noble Drilling, Inc., 242 F.3d 582, 585 (5th Cir. 2001) ("[M]aintenance does not provide for expenses such as telephone or automobile bills or the costs of supporting children.").

6. The parties, it should be noted, have done little to assist the court's consideration of this issue, as both parties failed to locate the most pertinent caselaw.

7. To be sure, at least one court has advocated the use of a *pro rata* calculation. See Alexandervich v. Gallagher Bros., 298 F.2d 918 (2d Cir. 1961) (holding that a plaintiff's "maintenance and cure" rate should be decreased by one-third because he spent only two of three weeks aboard ship). There is much to commend Alexandervich's logic. Cf. Crooks, 459 F.2d at 634 ("The position . . . has logic on its side. It can hardly be denied that double recovery results from allowing both shore-side wages and maintenance and that here the injured seaman is more than made whole."). If a seaman is obligated to pay for his own food and lodging in any event, decreasing any "maintenance and cure" proportionally makes some intuitive sense. See Barnes, 00 F.2d at 643 ("[T]here is some logic in [the] contention that allowing maintenance for shore-bound seamen constitutes a double recovery."). But there is also

substantial reason to reach the opposite conclusion, not least that there is apposite binding precedent. See especially Crooks, 459 F.2d at 633.

8. In his post-trial motion, plaintiff repeatedly emphasizes the rather quotidian point that the relevant factor "is the quality of the food and lodging afforded . . . , not the quantity . . . ." See Pl.'s Mot., at pp. 3–4 (making this argument no fewer than three times). Plaintiff's assertion is almost correct as far as it goes; when fashioning a "reasonable" daily rate, courts have often looked to "the cost of food and lodging equivalent to food and lodging on the vessel." Hall, 242 F.3d at 587; Gardiner, 786 F.2d at 946 ("The seaman is entitled to food and lodging of the kind and quality of that which he would receive aboard ship."). But plaintiff's repetition of this point does not vitiate his burden of production, nor does it entitle him to the generous rate he seeks (viz., $120 per day). See Pl.'s Mot., at p. 3 (conceding that "[p]laintiff . . . did not present evidence at trial of his actual living expenses"). Reference to a seaman's "shipboard food and lodging serves [only] to define the amount of maintenance as no more and no less than the reasonable costs of subsistence the seaman has incurred *while recuperating on land*." Hall, 242 F.3d at 587 (footnote omitted). What was offered onboard is simply not the sole consideration, and plaintiff's counsel errs (repeatedly) to imply as much.

9. The Ninth Circuit's observation that "more recent cases" have awarded flat per-diem rates instead of "actual out-of-pocket expenses" does not contradict this basic evidentiary prerequisite. See Gardiner, 786 F.2d at 946 (citations omitted). All that the Ninth Circuit's language suggests is that plaintiffs *may*, in certain contexts, be entitled to more or less than out-of-pocket expenses; it says nothing about plaintiff's preliminary obligation to adduce evidence of actual expenses. Id.

10. That plaintiff *did* testify at trial, and that he *did* testify (albeit off-pointedly) about this "maintenance and cure" question generally, only make the omission of evidence of actual expenses more glaring. Plaintiff may have conducted his "own investigation" about the approximate cost of replacing ship-provided benefits, and he may have recounted his "findings" during trial. But all of this is beside the point: Nothing in plaintiff's "investigation" defines what expenses he actually incurred, and nothing about plaintiff's statements cuts to the core of the relevant inquiry. Courts have long held that a plaintiff's failure to adduce "evidence of actual expenses" will bar recovery of maintenance. See Hall, 242 F.3d at 590. Even the most generous view of plaintiff's evidentiary burden suggests that he largely elided his obligations here. See Bachir v. Transoceanic Cable Ship Co., 2002 WL 1870068, 2 (S.D.N.Y. 2002) ("To enable the court to determine the appropriate past maintenance award, the plaintiff must provide the court with an evidentiary basis for the award. Plaintiff's burden . . . may be satisfied by the seaman's own testimony concerning his actual expenditures or concerning the reasonable cost of food and lodging in his area."). No evidence of actual costs were adduced, and only vague claims about "reasonable" prices were submitted. See Pl.'s Mot., at p. 3. In fact, if the court were to accept plaintiff's attorney's position (viz., that he adduced no actual expense evidence) outright, plaintiff may well recover *no* maintenance at all. See Hall, 242 F.3d at 589–90. Since there is some evidence of actual expense (and reasonable expense) elsewhere in the record, however, the court will assign a maintenance figure nevertheless — doing for plaintiff what plaintiff's counsel improperly neglected to do himself.

11. In fact, plaintiff's evidence at best bespeaks a pervasive misunderstanding of his evidentiary burdens and a strange misreading of the relevant case law; at worst, it suggests an unwelcome (and cynical) effort to inflate plaintiff's supposed "maintenance and cure" rate by withholding pertinent—and required—information.

12. Though plaintiff neglects to include the relevant calculation, the court assumes that the $338,927.50 figure breaks down this way: 1081.7 hours at $300 ($324,510); 3.8 hours at $250 ($950); 49.6 hours at $200 ($9,920); and 47.3 hours at $75 ($3547). See Decl. of E. Bull, Exh. A.

13. A district court's award of attorneys' fee will be reviewed by an appellate court for abuse of discretion. See McGrath v. County of Nevada, 67 F.3d 248, 252 (9th Cir. 1994).

14. At the outset, the court must note that plaintiff's counsel omits both the requested hourly rate *and* the hours expended figure from the body of his post-trial motion. The numbers are missing from the text of his attached declaration as well. To find plaintiff's counsel's calculation, in fact, one must look to the last page of the first exhibit to the declaration; one must also figure through plaintiff's math, most of which is summarized (though not explained)—in marking pen—on the bottom of the last page. See Decl. of E. Bull, Exh. A. These omissions, and the inherent carelessness they reflect, are frustrating and unhelpful to the court, but they are not altogether surprising.

15. Plaintiff asks the court to strike Ms. Morris' declaration as "argumentative" and inexpert. See Fed. R. Civ. P. 12(f); Pl.'s Rule 12(f) Mot., at pp. 1–2 (listing as inappropriately argumentative statements like "these hours should be stricken from the record"). As a "maritime law expert," plaintiff's counsel should know that motions for attorneys' fees are often opposed through declarations listing improperly billed time. Such declarations are not overly argumentative or inexpert; they are part of the attorneys' fees calculation process. Plaintiff's Rule 12(f) motion is DENIED accordingly, and he will receive no credit for the time he spent drafting it.

16. Nowhere in his brief does plaintiff actually note whether or not his agreement with plaintiff's counsel includes a contingency fee provision. Instead, plaintiff's brief explains –at tedious length – different circuits' approaches to attorneys' fees requests in the context of contingency fee agreements, only obliquely hinting that a contingency agreement existed here. And even this indirect suggestion of the existence of such an agreement fails to offer any detail of what that putative agreement might have contemplated. Given plaintiff's unnecessarily extensive discussion of inapposite law, this omission is particularly odd, leaving it again to the court to do plaintiff's counsels work for him –and to reject, as Ninth Circuit doctrine demands, any attempt to enhance his fee reward based on contingent risk.

17. That plaintiff attempted, on the very eve of trial, to transform this jury trial into a bench trial only highlights the absurdity of plaintiff's counsel's attempt to recover fees for the preparation of two largely coextensive sets of jury instructions.

18. In an apparent effort to be cute, plaintiff's counsel includes an "[h]istorical note of no legal relevance" in his post-trial briefing, one that discusses an irrelevant familial connection to one of the parties in a 1932 Supreme Court case. See Pl.'s Mot., at p. 15 n.3. The court is unsure precisely why plaintiff's counsel feels compelled to engage in such self-satisfied digressions, but the note does illustrate well his persistent inability to filter out unimportant, unedifying, and unhelpful information. At most, the "note" epitomizes plaintiff's counsel's habit of overdoing, overarguing, and overwriting (as does his failure to abide court page limits in his post-trial motion). These supposedly clever turns may please plaintiff's counsel, but they do not qualify as "reasonable" efforts, and they do not merit inclusion in any attorneys' fees total.

19. During plaintiff's testimony, for example, plaintiff's counsel devoted a number of minutes to an entirely inapposite discussion of Power Rangers.

20. Never one to leave a silence uninterrupted or a page unfilled, plaintiff's counsel recounts the facts of plaintiff's injury and employment history at interminable length in his post-trial briefing. See Pl.'s Mot., at pp. 1–14. Some of this history helps give shape to the narrow questions before the court, viz., what rate of "maintenance and cure" is due and what amount of fees is appropriate. But most of this history is wholly irrelevant to the issues now before the court, and counsel's inclusion of such extraneous information does not warrant reward; in fact, it merits precisely the opposite.

21. Throughout his brief, plaintiff argues that defendants' unrelenting litigation strategy justifies an increase in his attorneys' fees award. Plaintiff may be correct that defendants were obdurate; a jury found as much. But such recalcitrance does not itself merit an increased *fee* award, and plaintiff's theory depends on an impermissible kind of double-counting, albeit of an understandable type. That defendants behaved stubbornly (even wilfully) vis-a-vis "maintenance and cure" entitles plaintiff's counsel to seek attorneys' fees in the first instance; it does not, without more, justify increasing the fee total. And it does not, despite plaintiff's suggestions, permit the court to smuggle a kind of exemplary / punitive damage sum into the attorneys' fees award. See Pl.'s Mot., at p. 31 (arguing that the fee total should, like punitive damages, "serve as . . . an effective deterrent"). Plaintiff's counsel knows quite well that plaintiffs cannot seek punitive damages in the "maintenance and cure" context; he says as much in his brief. See id. (citing Glynn, 57 F.3d at 1495). Still, plaintiff asks for an identical type of damages here (in substance if not in form), demonstrating again an in inability to separate the appropriate from the tendentious.